strued as excepting by implication liens entitled to special priority under the registry laws—especially as this tends to uphold the policy of the registry statute, and puts no undue burden on the mechanic. It seems a reasonable proposition to assert that when a mechanic, under contract with A, erects buildings on property claimed by A, his mechanic's lien shall attach only to A's interest in the property.

TATE V. WINFREE.*

Supreme Court of Appeals: At Richmond.

February 12, 1901.

1. STATUTE OF LIMITATIONS—*Action by surety against co-surety for contribution.* The right of action of a surety who calls upon a co-surety for contribution is based upon the promise growing out of the equitable relations which the sureties bear to each other, and not upon the written contract by which they became sureties. The statute of limitations applicable to such a case is three years, and not the limitation which applies to the bond, note, or other writing which he has been compelled to pay.

Petition for appeal from the Circuit Court of the city of Lynchburg. *Refused.*

John H. Lewis and *Caskie & Coleman,* for the appellant.

BY THE COURT:

The right of one surety to call upon his co-surety for contribution, like the right of all sureties to call upon the principal for indemnity, arises from a principle of equity growing out of the relation which the parties have assumed towards each other. That equity springs up at the time of entering into that relation and is fully consummated when the surety is compelled to pay the debt. *Wayland* v. *Tucker,* 4 Gratt. 267; 1 White & Tudor's Lead. Cases in Equity, Vol. 1, p. 134.

The right of action in such case is based upon the implied promise arising from the equitable relations which the sureties bear to each other, and not upon the written contract by which they became sureties. The statute of limitations applicable to such a case is three years, and not the limitation which applies to the bond, note or other writing which they have been compelled to pay. Sec. 2920 of the Code. See *Faires* v. *Cockrell,* 28 L. R. A. 528.

Appeal denied.

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*Reported by M. P. Burks, State Reporter.

NOTE.—The claim of the surety against his co-surety for contribution, being not on the written contract with the creditor, but on an implied contract between the sureties for contribution, the ruling in the principal case seems based on soundest principles. The opinion of the Texas court in *Faires* v. *Cockrill*, 88 Tex. 428, 28 L. R. A. 528, upon which the principal case rests, treats the question at length, and in the most satisfactory manner.

Not every implied contract, however, is governed by the doctrine of the principal case. There are implied contracts which are technically written contracts, and to which the limitation prescribed for written contracts (five years in Virginia) is applicable—for example, the contract of the drawer and indorsers of a check or bill of exchange, and the indorser of a promissory note. The contract of none of these parties appears on the face of the instrument, but is supplied by legal implication. Yet, as the action is on the instrument itself, and as parol evidence is neither required to establish the contract, nor permitted to contradict the legal implication, such contracts are for all purposes regarded as written. See 4 Va. Law Reg. 458, 538; *Connor* v. *Becker* (Neb.), 76 N. E. 891.

So the implied promise to pay interest after maturity, on a written promise to pay money, being a conclusive presumption from the written contract, must necessarily be governed by the same principle.

The opinion in *Faires* v. *Cockrill* (*supra*) discusses the general subject of the application of the statute of limitations as between principal and surety, and between co-sureties, both on written and unwritten contracts. The statement is made that if a surety making payment is *himself bound to pay*, he may recover of his principal or co-surety, although at the time of such payment the principal or co-surety might have successfully pleaded the limitation against the common creditor. This is doubtless true where the paying surety was compellable to pay, through no default of his own; as for example, where he alone is sued before the bar of the statute has attached and payment is enforced against him after the debt is time-barred as to the principal or co-surety. Here it is plain that the cause of action for exoneration or contribution does not arise until actual payment, and every principle of justice demands that the paying surety shall not be affected by the circumstance that the creditor's action against the principal or co-surety is barred. A leading case on this subject is *Peaslee* v. *Breed*, 10 N. H. 489, 34 Am. Dec. 178. In that case, one of two joint debtors made certain payments to the creditor before the period of limitation had expired, the result of which was (under the New Hampshire law) to extend the period of limitation as to the debtor making the payment, but not as to the other. After the debt was barred as to the latter, the personal representative of the still bound debtor made a payment thereon, and sued the other for contribution. It was rightly held that the claim to contribution was not affected by outlawry of the debt as between the defendant and the original creditor. The court was careful to say that if the paying surety had declined to plead the statute when he might have done so, or had otherwise voluntarily paid when not bound to pay, a different question would have been presented. Other cases on this point are collected in the opinion in *Faires* v. *Cockrill* (*supra*).

The Virginia case of *Turner* v. *Thom*, 89 Va. 745, illustrates the converse of the rule. Here joint notes by two makers were barred as to one of the makers; but, as the notes were held by a bank of which the other maker was president,

and of which he had "entire control and management . . . and determined what claims should be put in suit," it was clear that the second maker could not avail himself of the statute of limitations. His trustee, therefore, in a general deed of assignment subsequently made by him, paid the debt in full, and sued the co-maker for contribution. It was held, and apparently on correct principles, that there could be no recovery. Here, it will be observed, the paying debtor had lost the benefit of the statute by his own laches—making the "different question" suggested in the New Hampshire case. In the Virginia case, however, the court lays down the principle too broadly, namely, that "the payment must have been made upon a debt for which the defendant [sought to be charged by contribution] *was legally liable at the time of the payment,* and which the obligor was compellable to pay, and not upon a debt which was barred as to the obligor sought to be charged." As already shown, and as brought out at length in the Texas case referred to, it may frequently happen that the co-promisor may be compelled to contribute to a payment made after the claim is barred as to himself.

The true principle would seem to be that wherever a surety pays a debt which he is compellable to pay, he may, in an action brought within proper time thereafter, compel exoneration or contribution from his principal or co-surety, notwithstanding the debt so paid was then time-barred as to the defendant of whom contribution is sought—provided the continued liability of the paying surety does not arise from some default of his own, or from some voluntary act, which could not have been compelled by the creditor under the contract as originally assumed.

It may be noted that by statute in Virginia it is provided (in substance) that no acknowledgment or promise by one of two or more joint contractors shall revive or extend the period of limitation as to the other contractor or contractors. Va. Code, sec. 2923.

SANDS' ADMINISTRATOR V. DURHAM.*

Supreme Court of Appeals: At Richmond.

March 14, 1901.

1. SUBROGATION—*When doctrine applicable.* Subrogation is the creature of equity, and essential justice is its object. It exists independently of the mere contractual relations of the parties, and, in its practical application, has been deemed broad enough to cover every instance in which one party has been required to pay a debt for which another is primarily answerable, and which, in equity and good conscience, ought to be discharged by the latter.
2. SUBROGATION—*Joint obligors—Partners—Payment of another's share.* Among joint obligors and partners each is primarily bound for his own share, and secondarily liable for the share of the other; and, although all are bound to the obligee, if one pays the share of another, all the essential conditions are present which entitle the former to be subrogated to the rights of the creditor against the latter.

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*Reported by M. P. Burks, State Reporter.